No. 77-1228

In the Supreme Court of the United States

OCTOBER TERM, 1977

CECIL K. NICKELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 552 F. 2d 684.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1977, and a petition for rehearing was denied on February 3, 1978 (Pet. App. B). The petition for a writ of certiorari was filed on March 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion under the Jencks Act, 18 U.S.C. 3500, to inspect all of the investigative reports made by an F.B.I. agent who was a witness in the case.

2. Whether petitioner was denied a fair trial by certain comments made by the prosecutor during the course of the trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of aiding and abetting an unlawful entry of a bank, in violation of 18 U.S.C. 2113(a) and 2(a). He was sentenced to 15 years' imprisonment. A divided panel of the court of appeals affirmed (Pet. App. A).

The evidence at trial established that on the night of September 15, 1974, two would-be bank robbers, James Roberts and William Green, broke into the First National Bank of Cincinnati in Springdale, Ohio. They were arrested when a silent alarm went off as they were in the process of cutting into the bank's safe (Tr. 57, 67, 143). According to Roberts' testimony, petitioner was the driver of the proposed getaway car but failed to respond when the burglars radioed him to pick them up (Tr. 141). Petitioner and Green testified, however, that petitioner had taken no part in the robbery scheme, and petitioner presented an alibi defense for the evening in question (Tr. 234, 360-361).

The government introduced substantial evidence to corroborate Roberts' version of the events, including records of telephone calls between petitioner's and Roberts' phones (Tr. 205-207), testimony establishing petitioner's presence with both bank robbers at the scene of an accident two days before the attempted robbery (Tr. 191-193), and a copy of a motel registration in the name of Lonnie Wiley that Roberts said had been made for him and Green by petitioner (Tr. 109-110, 212). In addition, the government's cross-examination of petitioner's alibi

witnesses, as well as the testimony of rebuttal witnesses, either contradicted or cast doubt on the credibility of their stories (Tr. 287-288, 394, 398-399, 409, 441).

ARGUMENT

1. Petitioner claims (Pet. 5-13) that the district court violated the Jencks Act, 18 U.S.C. 3500, in refusing to order production of all of the investigative reports of an F.B.I. agent who testified as a rebuttal witness in the case. Petitioner contends that these reports were "statements" within the meaning of the statute[1] and thus were producible under Section 3500(b).[2] Furthermore, petitioner urges that the trial judge erred at the very least in declining to screen the requested materials for

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[1]18 U.S.C. 3500(e) provides:

> (e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

[2]Section 3500(b) provides:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

relevancy to the direct testimony of the agent, pursuant to the procedure outlined in Section 3500(c).[3] These claims are insubstantial.

a. Agent Charles Williams of the Federal Bureau of Investigation was called to the stand during the government's rebuttal case. His testimony was limited to the details of his post-arrest interview of Green, during which Green had given a false name (Tr. 406-413). The agent had not been a witness to any of the events surrounding the burglary, and, as noted above, he did not testify during the government's case-in-chief.

Prior to Agent Williams' testimony, the government complied with several of petitioner's Jencks Act requests. All of the statements taken by Agent Williams from the

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[3]Section 3500(c) provides:

> If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

government's trial witnesses had been produced (Tr. 145, 195), and Green's post-arrest statements to the agent had been furnished as exculpatory material under *Brady* v. *Maryland,* 373 U.S. 83 (Tr. 215, 217). Nevertheless, at the conclusion of Agent Williams' rebuttal testimony petitioner moved pursuant to 18 U.S.C. 3500 for production of all "statements" made by the agent in the possession of the government, as embodied in any investigative report he may have filed in the case. The breadth of petitioner's discovery demand was demonstrated by his counsel's remark that "[w]e think that anything that this witness may have submitted committed to writing would be discoverable once he is called to the stand" (Tr. 425). The district court denied the request, accepting the government's representations that none of Agent Williams' remaining investigative reports fell within the Jencks Act (Tr. 426).

The court of appeals correctly affirmed the trial judge's order in the circumstances of this case. It should be emphasized at the outset that the government did not claim, and the court below did not hold, that a prior recorded statement of a law enforcement agent who testifies at trial is not subject to the provisions of the Jencks Act. Nor did the court hold that an investigative report could never contain "statements" made by the government agent that would be producible under the Act. Notes and reports of law enforcement agents are of course subject to production under Section 3500 if the requirements of that statute are otherwise satisfied. See, *e.g., United States* v. *Johnson,* 521 F. 2d 1318, 1319 (C.A. 9); *United States* v. *Bell,* 457 F. 2d 1231, 1235 (C.A. 5); *Lewis* v. *United States,* 340 F. 2d 678, 682 (C.A. 8).

The basis of the court of appeals' ruling (see Pet. App. 31-34) was simply that, apart from the report relating to Green that already had been provided to the defense,

there was no other prior recorded statement by the agent "relat[ing] to the subject matter as to which the witness ha[d] testified" on direct examination. 18 U.S.C. 3500(b). As the Court noted in *Scales* v. *United States,* 367 U.S. 203, 258, "there can be no complaint by a criminal defendant that he has been denied the opportunity to examine statements by government witnesses which do not relate to the subject matter of their testimony, for such statements bear no greater relevance to that testimony which he seeks to impeach than would statements by persons unconnected with the prosecution." The Assistant United States Attorney explained at trial that Agent Williams' "302" reports were composed solely of "a compilation of statements of a number of other witnesses" (Tr. 425) and that the only notes or reports made by Agent Williams that had not already been furnished to defense counsel were statements taken by the agent from people who had not testified (Tr. 424). Hence, since none of the material sought by petitioner was relevant to the limited subject of the agent's direct testimony, *i.e.,* whether Green, one of petitioner's principal witnesses, had lied about his identity at the time of his arrest, the trial judge correctly denied his motion.

In sum, the court of appeals properly refused to endorse a "broad right [that] would require * * * a wholesale turnover of FBI files to any defendant on demand * * *" (Pet. App. 34). One of the major purposes of the Jencks Act was to prevent defendants from being able to roam at will through government files. *Goldberg* v. *United States,* 425 U.S. 94, 104; *Palermo* v. *United States,* 360 U.S. 343, 350-354. That purpose would not have been served by permitting the kind of "fishing expedition" that petitioner requested. *United States* v. *O'Brien,* 444 F. 2d 1082, 1085 (C.A. 7); *United States* v. *Graves,* 428 F. 2d 196, 199 (C.A. 5), certiorari denied, 400 U.S. 960.

b. Since "[t]he record before [the trial judge] disclosed no basis for belief that a Jencks Act 'statement' existed other than those already furnished to defense counsel," and the judge "had before him no showing of relevance or materiality of any evidence contained in Agent Williams' 'reports' " (Pet. App. 34), there is nothing to petitioner's further claim that he was at least entitled to an *in camera* hearing on his discovery motion as well as a sealing of the withheld documents for appellate review.

Section 3500 prescribes no particular procedure for making the initial determination whether a document is a "statement" within the meaning of the statute. Although this Court has approved, and sometimes required, the holding of a hearing to obtain additional evidence on the question, it has recognized that whether such a hearing must be conducted depends on the circumstances of each case. See *Campbell* v. *United States,* 365 U.S. 85, 92; *Goldberg* v. *United States, supra,* 425 U.S. at 108-109; *Palermo* v. *United States, supra,* 360 U.S. at 354-355. A hearing was required in *Goldberg* and *Campbell,* for example, only because questions had arisen regarding whether a witness had "adopted or approved" (see 18 U.S.C. 3500(e)(1)) a government report of his interview, questions that could only be resolved by resort to extrinsic evidence. *Goldberg* v. *United States, supra,* 425 U.S. at 109; *Campbell* v. *United States, supra,* 365 U.S. at 93. In both cases a document incorporating prior statements of the witness, relevant to his trial testimony, concededly was in existence, and further factual inquiry was thought necessary to determine whether the document satisfied the precise requirements of the Act. Here, by contrast, petitioner failed to make any showing that the government was in possession of a prior "statement" of Agent Williams that was relevant to the single and quite

limited matter about which the agent had testified at trial. See Pet. App. 33; *Goldberg* v. *United States, supra,* 425 U.S. at 122-123 (Powell, J., concurring in the judgment).

Nor do the provisions of Section 3500(c) support petitioner's position. By its very terms, that subsection applies only when the government has been ordered to produce a "statement" but asserts that parts of it are unrelated to the witness's testimony. The court must then inspect the statement and excise the irrelevant material. Only upon the objection of the defendant to the excisions made under this procedure must the withheld portions of the "statement" be preserved for appellate review. In view of the district court's ruling that Agent Williams' investigative reports in their entirety were not producible under the Jencks Act, the procedures of Section 3500(c) were inapplicable. *United States* v. *O'Brien, supra,* 444 F. 2d at 1085; *United States* v. *Graves, supra,* 428 F. 2d at 200. See *Campbell* v. *United States, supra,* 365 U.S. at 93.

2. Petitioner contends (Pet. 13-22) that he was denied a fair trial by various comments made by the prosecutor during the course of the trial. Petitioner also asserts that the courts of appeals have varied in their treatment of prosecutorial misconduct claims and that this Court should establish specific standards to offer guidance in such situations.[4] These differences in result, however,

[4]Although petitioner cites several cases in which misconduct by the prosecutor led to the reversal of a conviction, each of these cases is distinguishable from the case at bar. In *Berger* v. *United States,* 295 U.S. 78, *United States* v. *Leon,* 534 F. 2d 667, 681 (C.A. 6), and *United States* v. *Phillips,* 527 F. 2d 1021 (C.A. 7), serious instances of prosecutorial misconduct were left largely unchecked, and in some instances were even approved, by the trial judge. In *Hall* v. *United States,* 419 F. 2d 582 (C.A. 5), the prosecutor made a wide range of

simply suggest that claims of this sort must depend for their resolution on an individualized factual evaluation. Not every instance of improper prosecutorial comment requires the reversal of a conviction, particularly where, as here, the claim is not that a specific constitutional right has been infringed, but rather that the cumulative effect of the objectionable remarks so infected the trial with unfairness as to amount to a denial of due process. See *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 645. In such cases, the impact of the alleged misconduct must be examined in the particular circumstances of the trial as a whole.

The most appropriate response to isolated instances of improper comment that may occur from time to time throughout trial is prompt action by the trial judge to check the overzealous prosecutor and minimize any prejudicial effect. See, *e.g., United States* v. *Esquer,* 459 F. 2d 431, 435-436 (C.A. 7), certiorari denied, 414 U.S. 1006; *Chavez* v. *United States,* 387 F. 2d 937, 939 (C.A. 9); *Trimble* v. *United States,* 369 F. 2d 950, 952 (C.A.D.C.). In this case the court of appeals concluded that none of the prosecutor's admittedly inappropriate remarks was so serious by itself as to affect the fairness of the trial and that the "immediate and firm response" of the trial judge in sustaining objections, admonishing the

prejudicial remarks, including statements of his personal belief concerning a controverted issue of fact and charges of witness-tampering, which, as the court of appeals noted, "went to the integrity of the trial itself." *Id.* at 585. Petitioner also cites *United States* v. *Bell,* 506 F. 2d 207 (C.A.D.C.), as an example of prosecutorial misconduct amounting to reversible error, whereas in fact the court there affirmed the conviction, finding that the challenged statements did not affect the fairness of the trial. *Id.* at 226.

government attorney, and giving a cautionary instruction to the jury eliminated any possibility of prejudice to petitioner (Pet. App. 29).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.

*The Solicitor General is disqualified in this case.

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